Filed 4/10/12 P. v. Tovar CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. VICTOR ALVAREZ TOVAR, Defendant and Appellant.	2d Crim. No. B228953 (Super. Ct. No. 1310096) (Santa Barbara County)

Victor Alvarez Tovar appeals the judgment entered after a jury convicted him on two counts of kidnapping to commit robbery (Pen. Code,[1] § 209, subd. (b)(1)), and one count of second degree robbery (§ 211). The trial court sentenced him to an aggregate sentence of life in prison with the possibility of parole plus three years, consisting of two concurrent life terms on the kidnapping to commit robbery counts plus a consecutive three-year term for the robbery. Appellant contends (1) the court erred in admitting the preliminary hearing testimony and other evidence relating to a purportedly unavailable witness; (2) the sentence imposed on the robbery count should have been stayed under section 654; (3) his sentence amounts to cruel and unusual punishment; and (4) the court committed instructional error. We shall order the sentence on the robbery count stayed. Otherwise, we affirm.

---

[1] All further undesignated statutory references are to the Penal Code.

STATEMENT OF FACTS

The Victims' Testimony

On January 19, 2009, longtime friends Juan Carlos Gutierrez and Pedro Lopez were playing basketball when Gutierrez received a text message from his former girlfriend Ana Mendez. Gutierrez and Mendez had recently broken up after dating for several months, but Mendez continued to call Gutierrez asking if he could give her money or a ride somewhere. Gutierrez had recently loaned Mendez $1,600 that she had yet to pay back. Mendez had subsequently asked Gutierrez for an additional $1,200, but he told her he did not have the money.

On this occasion, Mendez asked if Gutierrez could give her a ride home from the Wal-Mart in Santa Maria. Mendez told Gutierrez to come alone because she had something to tell him. Gutierrez, however, brought Lopez along because they were in Lopez's brother-in-law's car and Lopez had no other ride. When they arrived at the Wal-Mart where Mendez was supposed to be waiting, Gutierrez saw appellant and another man waiting in the parking lot. Appellant, whom both Gutierrez and Lopez recognized as Mendez's cousin, told Gutierrez that Mendez was at a nearby store. Appellant and his companion got in the back seat of the car, and appellant told Gutierrez to drive to several nearby storefronts. After several unsuccessful attempts to find Mendez, Gutierrez came to believe she was not there and stopped driving. Appellant took out what appeared to be a gun and pointed it at Gutierrez's back. From Lopez's vantage point in the front passenger seat, it looked as if appellant had loaded the gun by pulling back the slide. Lopez also saw that the other man was brandishing a knife.

Appellant demanded money from Gutierrez. Appellant said that Mendez needed the money, and claimed that Gutierrez had promised to give it to her. When Gutierrez denied having any money, appellant told him to figure out where to get some. Gutierrez was scared, so he gave appellant $200 that he had on his person. Appellant then switched seats with Gutierrez, put the gun in his pants, and started driving around town. The other man took Gutierrez's cell phone from him and turned it off.

Appellant insisted that Gutierrez figure out how to get more money and said he needed it to bail Mendez out of jail. Appellant threatened to "bury" Gutierrez and Lopez. Lopez told appellant that he had money at his house. Appellant drove to Lopez's house and went inside with him while the other man stayed in the car with Gutierrez. After Lopez gave appellant $200, they got back in the car and appellant drove away.

Appellant drove to an alley. He told Gutierrez and Lopez not to call the police or talk to anybody about what had happened because he knew where they both lived and worked. Appellant and his companion then got out of the car, returned Gutierrez's phone, and left. The next day, Gutierrez and Lopez told their boss what had happened and he took them to the police station. When Mendez called Gutierrez that same day, he asked her if appellant had given her the money. She replied that he had.

After appellant was arrested, Mendez found Gutierrez at Lopez's house and asked him to drop the charges against appellant. Mendez was subsequently arrested after she went to Gutierrez's workplace and his boss called the police. When the police interviewed Mendez's roommate, he told them that a toy BB gun Mendez had bought him was missing. No gun was ever found.

Mendez's Preliminary Hearing Testimony

Mendez invoked her Fifth Amendment rights and refused to testify at appellant's trial. She was subsequently declared unavailable to testify and her preliminary hearing testimony was read into evidence pursuant to Evidence Code section 1291. Mendez testified that she had been dating Gutierrez for about three to four months when the crime took place. She needed money to pay traffic fines, but falsely told appellant she was in jail so that he would give the money to her. Appellant saw Mendez crying and told her he would "ask a friend" if he could borrow the money she needed.

Mendez believed that appellant had contacted Gutierrez on the night of the incident to ask for a ride, and not because he was planning to get money from him on her behalf. When she called Gutierrez later that night, she thought he was driving appellant from Wal-Mart to her house. At around 11:30 p.m., appellant arrived at Mendez's house and gave her $400. When she asked where the money came from, appellant told her that

Gutierrez had given it to him to pass along to her. Mendez also learned that $200 of the money had come from Lopez, and she believed that Gutierrez would pay Lopez back. Mendez kept $270 of the money and loaned appellant the rest.

At some point after the incident, Gutierrez asked Mendez if she had received the money from appellant. Mendez replied in the affirmative and asked if there was a problem. Gutierrez did not say he had been robbed, but was merely concerned that appellant had not given her the money. When Mendez offered to pay the money back to appellant on February 15, he told her not to worry about it. She made the offer because the money had "caused a whole bunch of problems" and Gutierrez "was saying that he was robbed, and in reality, he wasn't."

Mendez admitted that she was lying during her initial police interview when she said appellant was her cousin; he was actually her new boyfriend. Mendez had also instructed her brother to tell Gutierrez that appellant was her cousin because she did not want him to know she was dating someone else.

Mendez's Police Interview

Detective Michael McGehee interviewed Mendez after her arrest. Portions of an audio recording and transcript of the interview, along with Detective McGehee's testimony regarding the statements Mendez made during that interview, were admitted to impeach Mendez's preliminary hearing testimony. During the interview, Mendez initially denied knowledge of the robbery and subsequently claimed that the robber's name was Jerry Gonzales. She eventually admitted that it was appellant. Mendez also admitted falsely telling Gutierrez she was incarcerated so that he would give her money, and that Gutierrez told her he had been robbed by her "cousin" at gunpoint.[2]

During the interview, Mendez referred to appellant as her cousin and never admitted that he was her boyfriend. She claimed that on the night of the incident,

[2] Gutierrez said this during a pretext call he made to Mendez the day after the incident.

appellant had overheard her crying as she spoke to Gutierrez on the phone and asked him for money. Appellant told Mendez, "I'll take care of it." That same night, appellant and another individual Mendez did not know called her using three-way dialing and told her to tell Gutierrez that she was waiting for him outside of Wal-Mart. Mendez agreed to the plan and made the call from her house. Appellant returned to Mendez's house later that night. When Detective McGehee asked if she "knew they were gonna go get money," Mendez replied: "I didn't think they were gonna go over there with him. I didn't think they would do anything like that." Mendez's demeanor and body language throughout the interview led Detective McGehee to believe that she was lying to protect appellant.

Defense

Officer Felix Diaz of the Santa Maria Police Department spoke to Gutierrez and Lopez when they came to the police station to report the kidnapping and robbery. Gutierrez told Officer Diaz that the incident began when he received a text message from Mendez while playing soccer with friends. He also identified appellant as the suspect, and said the gun he used had a chrome color.

Manuel Edward Anaya is a friend of appellant who had lived with him for about six months. Appellant introduced Mendez to Anaya, and he knew Gutierrez as Mendez's ex-boyfriend. Either Mendez or appellant told Anaya that Mendez had introduced appellant to Gutierrez as her cousin. Anaya believed that Mendez told people appellant was her cousin so that she could keep receiving money from Gutierrez.

After the incident, appellant told Anaya that he had not robbed Gutierrez. Appellant claimed he had peacefully obtained the money from Gutierrez and turned it over to Mendez. Appellant told Anaya that he did this alone, and that afterwards Gutierrez had given him a ride home. Appellant also said that Mendez said she needed the money to pay traffic fines and that Gutierrez had promised to give it to her.

DISCUSSION

I.

Mendez's Preliminary Hearing Testimony

Appellant contends the court violated his constitutional right to confrontation of witnesses by admitting Mendez's preliminary hearing testimony on the ground that she was unavailable to testify at trial. The People counter that the claim is forfeited because appellant did not object to the court's finding that Mendez was unavailable. In his reply brief, appellant essentially concedes that he did not preserve the claim below. He instead relies on the rule that "[a] defendant is not precluded from raising for the first time on appeal . . . certain fundamental, constitutional rights. [Citations.]" (*People v. Vera* (1997) 15 Cal.4th 269, 276-277, disapproved on other grounds in *People v. French* (2008) 43 Cal.4th 36, 47.) He alternatively urges us to exercise our discretion to address the claim "in order to decide an important issue."

We conclude that the claim is forfeited. Our Supreme Court has made clear that a claimed violation of one's rights under the confrontation clauses of the state and federal Constitutions is forfeited on appeal if not raised in the trial court. (*People v. Tafoya* (2007) 42 Cal.4th 147, 166; *People v. Seijas* (2005) 36 Cal.4th 291, 301 (*Seijas*).) Appellant also fails to persuade us that it would be an appropriate exercise of our discretion to consider the issue notwithstanding appellant's failure to preserve it below.

In any event, the claim lacks merit. "Although defendants generally have the right to confront their accusers at trial, this right is not absolute. 'If a witness is unavailable at trial and has testified at a previous judicial proceeding against the same defendant and was subject to cross-examination by that defendant, the previous testimony may be admitted at trial.' [Citations.] The defendant 'must not only have had the *opportunity* to cross-examine the witness at the previous hearing, he must also have had "an interest and motive similar to that which he has at the [subsequent] hearing."' [Citation.] Under these rules, 'we have routinely allowed admission of the preliminary hearing testimony of an unavailable witness.' [Citation.]" (*Seijas, supra*, 36 Cal.4th at p. 303.) "A witness who successfully asserts the privilege against self-incrimination is

unavailable to testify for these purposes. [Citations.]" (*Ibid.*; Evid. Code, § 240, subd. (a)(1).) Because the relevant facts are undisputed, we independently review the trial court's finding that Mendez validly asserted the privilege and was thus unavailable to testify. (*Seijas*, at p. 304.)

In determining whether the court erred in accepting Mendez's assertion of her privilege against self-incrimination and declaring her unavailable to testify, we are mindful that "[t]o invoke the privilege, a witness need not be guilty of any offense; rather, the privilege is properly invoked whenever the witness's answers 'would furnish a link in the chain of evidence needed to prosecute' the witness for a criminal offense." (*People v. Cudjo* (1993) 6 Cal.4th 585, 617.) "To deny an assertion of the privilege, 'the judge must be "'*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency' to incriminate.'" [Citations.]" (*Seijas, supra*, 36 Cal.4th at pp. 304-305.) "California's Evidence Code states the test broadly in favor of the privilege: 'Whenever the proffered evidence is claimed to be privileged under Section 940 [the privilege against self-incrimination], the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence is inadmissible unless it *clearly appears* to the court that the proffered evidence *cannot possibly have a tendency* to incriminate the person claiming the privilege.' (Evid. Code, § 404, italics added.)" (*Seijas*, at p. 305.)

The court did not err in accepting Mendez's assertion of her privilege against self-incrimination, and in thereafter declaring her unavailable to testify. In arguing to the contrary, appellant essentially complains that Mendez invoked the privilege before she had been asked any questions that had a tendency to incriminate her. The testimony of Gutierrez and Lopez, however, strongly suggested that Mendez had facilitated the crimes by inducing Gutierrez to "pick her up" under false pretenses. Gutierrez also testified that the day after the crimes Mendez verified that appellant had given her the money taken from Gutierrez and Lopez. Moreover, the prosecutor made it clear that Mendez would not be offered immunity in exchange for her testimony.

Mendez also met with separate counsel, who informed the court of his conclusion that Mendez "has valid grounds to assert the Fifth." Under the circumstances, the court did not err in accepting Mendez's assertion of the privilege and in thereafter declaring her unavailable to testify. It necessarily follows that the court did not err in admitting the transcript of the testimony Mendez gave at appellant's preliminary hearing.

Even if it could be said that the court erred in declaring Mendez unavailable to testify, the error would be harmless. Gutierrez and Lopez both identified appellant, an individual they both knew, as the perpetrator of the crimes against them. They also each offered consistent testimony regarding the details of those crimes. The only evidence appellant offered in his defense essentially consisted of a friend's statement that appellant had denied committing the crimes. Moreover, Mendez's preliminary hearing testimony was clearly directed at exculpating appellant. Indeed, Mendez took the position that Gutierrez and Lopez had fabricated the entire incident. Under the circumstances, any error in admitting Mendez's preliminary hearing testimony was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Cage* (2007) 40 Cal.4th 965, 991–992 [*Chapman* harmless error analysis applies where evidence was admitted in violation of the confrontation clause].) In light of this conclusion, any error in overruling appellant's objections to certain portions of Mendez's testimony was also necessarily harmless.

II.

Mendez's Police Interview

Appellant asserts that the court also violated his confrontation rights by admitting the audio recording and transcript of portions of Mendez's police interview and Detective McGehee's testimony regarding the interview. The People respond that the claim is forfeited because it was not raised below, and in any event lacks merit.

We conclude the claim is forfeited because appellant did not object to the evidence on the ground that its admission would violate his confrontation rights.[3] On the

[3] Appellant did not object to McGehee's testimony. Although he objected to the recording and transcript of the police interview as more prejudicial that probative under

merits, we agree with appellant that Mendez's police interview and Detective McGehee's testimony regarding said interview should have been excluded. Because Mendez was declared unavailable, the admissibility of any evidence regarding her prior inconsistent statements was governed by Evidence Code section 1294. Pursuant to that section, evidence of prior inconsistent statements of an unavailable witness whose former testimony has been admitted is inadmissible hearsay unless it consists of (1) "A video recorded statement *introduced at a preliminary hearing or prior proceeding* concerning the same criminal matter," or (2) "A transcript, containing the statements, of the preliminary hearing or prior proceeding concerning the same criminal matter." (Evid. Code, § 1294, subd. (a), italics added.)

It is undisputed that the recording of Mendez's police interview was not introduced at the preliminary hearing. Although subdivision (b) of Evidence Code section 1294 provides an exception where the defendant chooses to "examine or cross-examine any person who testified at the preliminary hearing or prior proceeding as to the prior inconsistent statements of the witness," Detective McGehee's testimony does not qualify because he did not testify at the preliminary hearing. Because neither Mendez's police interview nor Detective McGehee's testimony were admitted at the preliminary hearing, they were inadmissible hearsay and should have been excluded. (*People v. Martinez* (2003) 113 Cal.App.4th 400, 410 (*Martinez*).)[4] However, for the same reasons we concluded that any error in admitting Mendez's preliminary hearing testimony was

---

Evidence Code section 352, that objection is insufficient to preserve his constitutional claim. (*People v. Martinez* (2010) 47 Cal.4th 911, 961.)

[4] The People's attempts to undermine *Martinez* are unavailing. The case merely follows the express language of Evidence Code section 1294, which clearly and unequivocally states that evidence of an unavailable witness's prior inconsistent statements, either in the form of a recording or transcript, is inadmissible hearsay unless it was offered at the preliminary hearing or a prior proceeding concerning the same matter. The People's arguments that the legislative history of the statute speaks to a different intent are of no moment. Because there is no ambiguity, the plain language of the statute controls. (*People v. Robinson* (2010) 47 Cal.4th 1104, 1138.) The People's characterization of *Delgadillo v. Woodford* (9th Cir. 2008) 527 F.3d 919, as reaching a different result is also unpersuasive. The evidence in that case, unlike the evidence at issue in both *Martinez* and this case, consisted of inconsistent statements offered by witnesses who had testified to those statements at the preliminary hearing. (*Id.* at p. 929.)

harmless, we conclude that the erroneous admission of the evidence regarding Mendez's police interview was also harmless. As the People aptly note, "At most, Mendez's inconsistent statements suggested there was a conspiracy between her and appellant to plan the robbery. Whether that evidence were admitted or not, there was no doubt that the victims believed appellant was the robber." Because the properly admitted evidence was overwhelming and the extrajudicial statements incriminating appellant were essentially cumulative of that evidence, the error in admitting the evidence was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *Martinez*, at p. 410.)

III.

Section 654

Appellant asserts that the three-year sentence imposed on count 3 for the robbery of Lopez should have been stayed pursuant to section 654 because he was already punished in count 2 for kidnapping Lopez to commit robbery. The People correctly concede the point. Section 654 bars multiple punishment for both robbery and kidnapping to commit robbery where both crimes are committed pursuant to a single intent or objective. (*People v. Lewis* (2008) 43 Cal.4th 415, 519.) It is undisputed that the kidnapping to commit robbery and the robbery of Lopez were committed pursuant to a single intent or objective, i.e., to obtain money by force or fear. Accordingly, we shall order the judgment modified to reflect a stayed sentence on count 3.

IV.

Cruel and Unusual Punishment

Appellant contends that his sentence of life with the possibility of parole plus three years amounts to cruel and unusual punishment under the federal and state Constitutions. (Cal. Const., art. I, § 17; U.S. Const., 8th Amend.) Because this claim was not raised in the trial court, it is forfeited. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229.) In any event, the claim lacks merit.

A sentence is cruel or unusual under California law if "'it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and

offends fundamental notions of human dignity.'" (*People v. Norman, supra*, 109 Cal.App.4th at p. 230, quoting *In re Lynch* (1972) 8 Cal.3d 410, 424.) In making that determination, courts consider the nature of the offense and offender, and compare the sentence with sentences imposed for more serious crimes in California and for the same crime in other jurisdictions. (*Norman,* at p. 230, citing *Lynch,* at pp. 425-427.) Similarly, a sentence is cruel or unusual under the Eighth Amendment to the United States Constitution if it is "grossly disproportionate to the severity of the crime." (*Rummel v. Estelle* (1980) 445 U.S. 263, 271; *Ewing v. California* (2003) 538 U.S. 11, 20.) The steps of the analysis under federal constitutional law are virtually identical to those applied under state law, and "the federal Constitution affords no greater protection than the state Constitution . . . ." (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510.) In addition, the length of a sentence for a felony "is purely a matter of legislative prerogative," and courts should be reluctant to review such legislative mandates. (*Rummel,* at p. 274, fn. omitted; *Hutto v. Davis* (1982) 454 U.S. 370, 374.)

In arguing that his sentence amounts to cruel and unusual punishment, appellant notes that he has no prior adult felony convictions and that his criminal history does not "reveal any violence or any particular heinous crimes, or crimes that show a tendency to commit violence against individuals." As for the nature of his current offenses, appellant offers that "[n]o one was injured and there was no physical violence." He also claims that "there was confusion about the money that was provided, as one of the victims admitted he regularly gave money to Ana Mendez and knew that the appellant was also a friend of Mendez." He goes on to question the victims' testimony that they feared for their lives because they "didn't rush to report the crime to the police, but did so only at the urging of their employer."

Appellant's attempts to minimize the nature of the offenses of which he was convicted are unavailing. In deciding whether a particular sentence amounts to cruel and unusual punishment, the facts of the case must be viewed in the light most favorable to the judgment. (*People v. Martinez* (1999) 76 Cal.App.4th 489, 496.) Appellant urges us to do the opposite. He also ignores any comparison of his sentence to those imposed for

more serious crimes in California and the same crime in other states, as is required in a cruel and unusual punishment analysis. (*People v. Norman, supra,* 109 Cal.App.4th at p. 230.) The court took the nature of the offense and offender into consideration when it declined to impose consecutive life terms on each of the two counts of kidnapping for robbery. Moreover, the statutorily-prescribed punishment for the crime of kidnapping to commit robbery is life with the possibility of parole. (§ 209, subd. (b)(1).) "Fixing the penalty for crimes is the province of the Legislature, which is in the best position to evaluate the gravity of different crimes and to make judgments among different penological approaches. [Citations.] Only in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive. [Citations.] This is not such a case." (*People v. Martinez, supra,* 76 Cal.App.4th at p. 494.) Appellant simply fails to demonstrate that his sentence "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch, supra,* 8 Cal.3d at p. 424, fn. omitted.) His claim of cruel and unusual punishment accordingly fails.

V.

CALCRIM No. 3517

Appellant contends the court erred by instructing the jury with CALCRIM No. 3517. He asserts that although the instruction is "technically correct," it is "ambiguous or misleading" in that it fails to make clear that the jury was free to consider whether he was guilty of lesser included offenses prior to deciding whether he was guilty of the greater offenses, as contemplated in *People v. Dennis* (1998) 17 Cal.4th 468, 536.[5]

[5] The instruction as given provides in pertinent part: "If all of you find that the defendant is not guilty of a greater crime, you may find him guilty of a lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct. [¶] Now I will explain to you which crimes are affected by this instruction: [¶] Simple kidnapping is a lesser crime of kidnapping with intent to commit robbery charged in counts one and two. [¶] False imprisonment is a lesser crime of simple kidnapping. [¶] Petty theft is a lesser crime of robbery charged in count three. [¶] It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime."

This claim is forfeited because it was not raised below. "Generally, a party forfeits any challenge to a jury instruction that was correct in law and responsive to the evidence if the party fails to object in the trial court. [Citations.]" (*People v. Franco* (2009) 180 Cal.App.4th 713, 719 (*Franco*).) While the rule of forfeiture does not apply notwithstanding the failure to object where the alleged error affects the defendant's substantial rights (*ibid.*), appellant fails to make such a showing here.

Appellant purports to find fault in the first sentence of the instruction, which states: "If all of you find that the defendant is not guilty of a greater crime, you may find him guilty of a lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime." Although the instruction goes on to plainly state that "[i]t is up to you to decide the order in which you consider each crime and the relevant evidence," appellant argues that this statement is "buried in the middle of the section" such that it "does not resolve the misleading condition presented at the outset." As appellant puts it, "[t]he first paragraph is the most important paragraph at the sentencing stage and conditions all following paragraphs."

In reviewing appellant's claim, we must determine whether the jury was reasonably likely to have construed the instruction in a manner that violated appellant's rights. (*People v. Rogers* (2006) 39 Cal.4th 826, 873; *Franco*, *supra*, 180 Cal.App.4th at p. 720.) We review the alleged error in the context of the entire record of trial, including other instructions and argument by counsel, because courts assume jurors are capable of understanding and correlating all of that information. (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.)

Considering CALCRIM No. 3517 and the record as a whole, it is clear that no reasonable juror would construe the instruction in the manner asserted by appellant. The instruction could not be clearer in its statement that "[i]t is up to you to decide the order in which you consider each crime and the relevant evidence . . . ." "'Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case.' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 390.) Although appellant contends the prosecutor made an argument "arguably suggesting" that

the jury could not consider lesser included offenses without first finding him not guilty of the corresponding greater offenses, the jury was also instructed that it must follow the law as explained by the court and must follow the court's instructions if they conflict with the attorneys' comments. (CALCRIM No. 200.) We presume the jury understood and followed this instruction. (*People v. Morales* (2001) 25 Cal.4th 34, 47.)

DISPOSITION

The three-year consecutive sentence imposed on count 3 is ordered stayed pursuant to section 654. The clerk shall prepare an amended abstract of judgment and forward a copy thereof to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

James F. Iwasko, Judge

Superior Court County of Santa Barbara

Richard C. Gilman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Idan Ivri, Deputy Attorney General, for Plaintiff and Respondent.